

STATE OF NEW MEXICO
BEFORE THE NEW MEXICO MINING COMMISSION



IN THE MATTER TO AMEND
19.10.3 NMAC (Minimal Impact Operations)

No. NMMC 15-02

**PETITION TO AMEND 19.10.3 NMAC
AND REQUEST FOR HEARING**

Pursuant to the New Mexico Mining Act (“Mining Act”), NMSA 1978, §§69-36-1 *et seq* (2015) and Section 301 of the *Guidelines for Rulemaking New Mexico Mining Commission*, the New Mexico Mining Association (“NMMA”) petitions the New Mexico Mining Commission (“Commission”) to amend the rules for Minimal Impact Operations, 19.10.3 NMAC (“Minimal Impact Rule”). NMMA’s proposed Minimal Impact Rule (“PMIR”), attached to this Petition as Attachment 1, would amend 19.10.3.303(A) NMAC and 19.10.3.304(A) NMAC to expand the disturbance area for minimal impact mining operations for non-energy fuel minerals that lack the potential for significant acid drainage from ten acres to forty acres in all areas of New Mexico except Bernalillo County, Dona Ana County, and Santa Fe County.

I. Summary of Proposed Amendments

The NMMA is a trade association that represents myriad interests within the mining industry in New Mexico. The NMMA is comprised of companies that explore, produce and refine metals, coals and industrial minerals; companies that manufacture and distribute mining and mineral processing; and individuals engaged in various phases of the mineral industry. The NMMA represents the mining industry on a wide variety of subjects, such as taxation, environmental quality, public health and safety and education through the expertise of its members. The diversity of NMMA’s members allowed the association to become extremely

familiar with New Mexico's rules and regulations relating to mining and mineral exploration. The NMMA is able, through its members, to identify areas in New Mexico mining law and regulations that would benefit from amendments and change. The NMMA has identified the Minimal Impact Rule as one such regulation.

As set forth in this Petition, there is a need to amend the current Minimal Impact Rule to lift restrictive permitting requirements that currently deter mid-sized non-energy fuel mineral operations from entering and operating in New Mexico. In order for such operations to realistically be able to gain access to mine in New Mexico, the Minimal Impact Rule needs to be amended to change the disturbance area for minimal impact non-energy fuel mineral operations from ten acres to forty acres. The PMIR specifically remedies the obstacles that the Minimal Impact Rule places in front of mid-sized mining operations; the proposed amendments are narrowly tailored to allow mid-sized mining to operate in New Mexico and to provide a number of benefits to the state. Other than expanding the surface disturbance allowed for non-energy fuel minerals that lack the potential for significant acid drainage, the proposed amendments leave the comprehensive permitting framework for minimal impact mining operations intact and do not unnecessarily complicate the Mining and Mineral Division's permitting scheme.

The proposed amendments to 19.10.3.303(A) NMAC and 19.10.304(A) NMAC would add language to the regulations that extend the surface disturbance limitation from ten acres to forty acres of land in the case of non-energy fuel minerals mining for operations that meet the following requirements: (1) that are outside of Bernalillo County, Dona Ana County, and Santa Fe County; (2) that lack any significant acid drainage; and (3) that are committed to perform concurrent reclamation to the extent practicable. The proposed amendments would strike the language in 19.10.3.303(A) NMAC and 19.10.304(A) NMAC that authorizes twenty acres of

surface disturbance for a new minimal impact permit for humate mining since that language would no longer be necessary in light of the NMMA's PMIR.

II. Statement of Reasons for the Rule Change

Authorizing the expansion of the disturbance area for minimal impact operations for non-energy fuel minerals that lack the potential for significant acid drainage from ten acres to forty acres will provide a number of benefits for New Mexico and the mining industry. As discussed more fully below, these benefits include promoting development of the mining industry, minimizing environmental disturbances associated with mining, promoting jobs and rural economic development, and maintaining strong regulatory oversight of minimal impact mining operations throughout the state.

A. Minimal Impact Mining Operations in New Mexico

(i) Current Regulations

In order to be considered a minimal impact mining operation, the operation must meet the requirements of a "minimal impact mining operation" as defined in 19.10.1.7 (M)(2) NMAC.

This regulation provides that a minimal impact operation is

A mining operation or an exploration operation determined by the Director, in consultation with other state agencies, likely to have minimal environmental impact if operated and reclaimed in accordance with the approved permit. In making this determination, the Director shall, except as set forth in Subsection M, Paragraph 2, Subparagraph j of 19.10.1.7 NMAC exclude from minimal impact status operations with any of the characteristics:

- (a) Located in or expected to have a direct surface impact on wetlands, springs, perennial or intermittent streams, lakes, rivers, reservoirs or riparian areas, except those excluded by 19.10.3.300 NMAC;
- (b) Located in designated critical habitat areas as determined in accordance with the federal Endangered Species Act of 1973 or in areas determined by the Department of Game and Fish likely to result in an adverse impact on an endangered species designated in accordance with the Wildlife Conservation Act, Sections 17-2-37 through 17-2-46 NMSA 1978 or by the State Forestry Division for the Endangered Plants Act, Section 75-6-1 NMSA 1978;

- (c) Located in an area with cultural resources listed on either the National Register of Historic Places or the State Register of Cultural Properties;
- (d) Having or expected to have a direct impact on ground water that has a total dissolved solids concentration of less than 10,000 mg/l, except exploratory drilling intersecting ground water may be performed as a minimal impact operation;
- (e) Expected to use or using cyanide, mercury amalgam, heap leaching or dump leaching in its operations;
- (f) Located in a known cemetery or other burial ground;
- (g) Located in an area designated as a Federal Wilderness Area, Wilderness Study Area, Area of Critical Environmental Concern, or an area within the National Wild and Scenic River System;
- (h) Expected to result in point or non-point source surface or subsurface releases of acid or other toxic substances from the permit area; or
- (i) Requiring a variance from any element of these regulations as part of the permit application.
- (j) The Director may determine that an operation with any of the characteristics set forth in Subsection M, Paragraph 2, Subparagraphs a through d of 19.10.1.7 NMAC may qualify for minimal impact status, if the Director finds the operation is likely to have minimal environmental impact if operated and reclaimed in accordance with the approved permit. In making this determination, the Director shall:
 - (i) obtain written concurrence from the Secretary of the Environment Department for a waiver of characteristics in Subsection M, Paragraph 2, Subparagraphs a or d of 19.10.1.7 NMAC;
 - (ii) obtain written concurrence from the Director of the Department of Game and Fish for a waiver of any portion of characteristic in Subsection M, Paragraph 2, Subparagraph b of 19.10.1.7 NMAC that does not apply to the State Forestry Division; and
 - (iii) obtain written consultation from and cooperate with the Office of Cultural Affairs for a waiver of characteristics in Subsection M, Paragraph 2, Subparagraph c of 19.10.1.7 NMAC.
- (k) In addition, where interrelated mining operations are located in close proximity to each other, the Director may determine to issue one permit for all the operations which may eliminate these operations from consideration as minimal impact operations. In determining whether or not the operations are interrelated, the Director shall look for common owners or operators, immediate family members as owners or operators, related corporations as owners or operators or other common, reliable indicators of interrelated operations.

The definition of minimal impact mining operations therefore contemplates limitations to mining operations that would otherwise qualify as minimal impact operations based on surface disturbance limitations and other requirements to obtain a minimal impact mining permit, which are set forth in 19.10.3 NMAC. These provisions limiting eligibility would be left undisturbed by NMMA's proposed amendments. Therefore, in addition to the provisions set forth in the

Minimal Impact Rule, an operation must meet the standards set forth in the definition of a minimal impact operation in order to qualify as a minimal impact mining operation. The Minimal Impact Rule provides comprehensive permitting requirements, including reclamation standards that are mandatory for any minimal impact mining operation.

New mining operations, which currently are all operations that are not “existing” and that exceed the ten acre disturbance threshold, are subject to the regulatory requirements of 19.10.6 NMAC. The requirements to get a new mining operating permit are considerably more strenuous than those mandated by the Minimal Impact Rule, and they stand as a significant impediment for industrial minerals development, which tends to be challenging in any event from the perspective of commercial viability. For example, in order to get a new mining operations permit, an applicant is required to submit a sampling and analysis plan (described in 19.10.6.602 (D)(12) NMAC) and take baseline data for a minimum of twelve months (19.10.6.602 (D)(13) NMAC). Moreover, the performance standards are quite onerous and are geared more toward significant precious metals operations and other major mines. The more onerous requirements to obtain a new mining permit are often prohibitive for mid-sized mining operators to entertain, and therefore many mid-sized mine operators are deterred from operating in New Mexico.

The paucity of permits that the Mining and Minerals Division has issued since the inception of the New Mexico Mining Act evidences the relative inaccessibility of new mining permits under the 19.10.6 NMAC rules. Since the inception of the New Mexico Mining Act in 1993 to the end of 2013 there has been a total of thirty three new minimal impact mining operations permitted in New Mexico and no regular new mining operations permitted in New Mexico. *See 2013 Annual Report of the Mining Act Reclamation Program to the New Mexico*

Mining Commission, Table 1. The current regulations clearly address the needs of very small mine and large mine operations. There is, however, a fundamental absence of regulations that address middle sized mine operations. The PMIR remedies that gap in regulatory oversight that has deterred middle sized mine operations from accessing operational permits in New Mexico.

(ii) Proposed Amendments to the Minimal Impact Rule

The proposed amendments to the Minimal Impact Rule exclusively seek to increase the amount of land a mine operator would be authorized to disturb in minimal impact operations for non-energy fuel minerals that lack the potential for significant acid drainage. The PMIR seeks to extend the disturbance area for such mine operations from ten acres to forty acres. The PMIR importantly does not seek to change the definition of “minimal impact mining operation,” and therefore any operation under the PMIR would still be required to meet carefully crafted definitional standards and limitations set forth in 19.10.1.7(M)(2) NMAC that are largely designed to assure no significant environmental impacts from the operations.

The PMIR is narrowly tailored and seeks specific and limited changes to the Minimal Impact Rule. The PMIR would only allow an increase in the disturbance area for non-energy fuel minerals that lack the potential for significant acid drainage. The mining of all other materials covered by the Mining Act would still have to create less than ten acres of disturbance in order to qualify for a minimal impact mine permit. Additionally, in accordance with the PMIR, mining of non-energy fuels that lack the potential for significant acid drainage under a minimal impact operations permit would not be authorized in the more populated counties of New Mexico, Bernalillo County, Dona Ana County, or in Santa Fe County. The PMIR therefore seeks specific and carefully confined changes to the Minimal Impact Rule that are relevant to the needs of the mining industry.

B. Benefits to New Mexico

The PMIR would offer many benefits to New Mexico, and would not create significant additional obstacles or work for regulatory officials since, as discussed above, the permitting regime would remain unchanged. New Mexico would benefit in the following ways:

1. Promote Development of the Mining Industry

As currently drafted, the New Mexico regulations govern the extreme ends of the mining spectrum. The regulations govern small operations as set forth in the Minimal Impact Rule, which only apply to mining operations that disturb less than ten acres of land. *See* 19.10.3.303(A) NMAC and 19.10.3.304(A) NMAC. Any mining operation that exceeds ten acres of disturbance is subject to much more detailed and demanding regulatory requirements, which are set forth in 19.10.6 NMAC. As currently drafted, the New Mexico mining regulations do not contemplate mid-sized mining endeavors that exceed ten acres of disturbance, but cannot survive the onerous permitting process for a mining operation under the 19.10.6 NMAC requirements. The NMMA recognizes that there is a need to create regulations for those in the mining industry that would like to pursue mid-sized mining operations, as many such operators are currently deterred from getting a permit to operate in New Mexico.

The PMIR would correct this regulatory gap by encouraging the development of mid-sized mining operations throughout the state. The PMIR would encourage non-energy fuel mineral mining to develop within New Mexico by eliminating the ten acre limitation that is a hindrance to many potential mining operations. The PMIR encourages mining development in an environmentally responsible way, since the PMIR limits the expansion of disturbance area exclusively to non-energy fuel minerals that lack the potential for significant acid drainage. The PMIR would only extend to mining operations for minerals that do not have significant acid

generating capabilities; the proposed rule would allow MMD to take into account neutralizing materials associated with the deposit, further assuring risks of acid rock drainage are minimized.

By encouraging middle sized mining operations to take root in New Mexico, the state will realize a number of economic benefits, which are discussed below.

2. Minimize Environmental Disturbance

Increasing the area of disturbance for minimal impact mining operations for non-energy fuel minerals that lack the potential for significant acid drainage does not mean there will be an increase in overall environmental disturbance; rather, allowing minimal impact mining operations to have a larger disturbance area will likely minimize the overall environmental disturbance of the mining operation by increasing the efficiency of mining.

As part of a mining operation, there is typically mining and crushing or processing of minerals. Under the current Minimal Impact Rule it is often not feasible for a crushing facility to be located near the mine site since the crushing facility would be counted as part of the ten acres of total disturbance. However, many non-energy fuel mineral mining operations would benefit from having crushing facilities close to the mine site.

Under the Minimal Impact Rule many crushing facilities are separately permitted as a minimal impact mining operation. Accordingly, one mine operator may have to obtain two or more minimal impact permits, one for the mine site and one for the crushing facility. The reality of this type of permitting is that minerals are mined at one site and have to be transported to other sites for processing. As a result, there are more disturbances to land that are created by having to use haul roads to transport materials to processing facilities with attendant increases in safety risks to employees and members of the public. Additionally, more fuel is consumed by trucks transporting materials from the mine site to the crushing facility.

The PMIR would allow crushing facilities to be located near, even next to, mine sites, which would decrease the environmental disturbance of the mining operation. The PMIR would therefore result in a decrease of energy consumed by a mine operation, and would eliminate the need to double or triple handle materials in an effort to extract minerals and then process them.

3. Increase Economic Benefits to New Mexico

The mining industry is very important to the local, regional, and state economy. By allowing and encouraging further mining development in the state, the PMIR would provide a number of economic benefits to New Mexico. Specifically, the PMIR would (a) promote job growth and creation by allowing mining operations to exist that otherwise would not; (b) increase the amount of taxes, state land royalties and rents New Mexico would receive by the mining industry; and (c) create an economic stimulus in rural communities that are currently in desperate need of economic growth and development.

The PMIR would encourage mine development in rural parts of New Mexico that would benefit from mining investment. Mining creates jobs, and the PMIR would allow more mines to operate in the state and therefore would increase the number of direct and indirect jobs available in smaller rural communities where the mines would be located. This economic stimulus would greatly benefit areas of the state that have not seen economic development in years in part because of prohibitively restrictive mining regulations for middle sized mine operators. New Mexico would also see an increase in revenue, as mineral extraction and production would result in an increase in taxes, royalties and rents being paid to the state.

4. Preservation of Regulatory Oversight

As discussed throughout this Petition, the PMIR only changes the size limitation for minimal impact operations of non-energy fuel minerals that lack the potential for significant acid

drainage. The PMIR otherwise leaves the regulatory framework for oversight of minimal impact operations intact. Accordingly, in order to qualify as a minimal impact mining operation, an applicant for a minimal impact operating permit would still be required to comply with all of the permitting application and operation requirements set forth in 19.10.3 NMAC. The PMIR does not lessen any reclamation requirements, and encourages simultaneous reclamation where feasible by the operator.

III. Request for Hearing

The New Mexico Mining Association respectfully requests that the Commission schedule a rulemaking hearing as soon as possible to consider the proposed amendments to the Minimal Impact Rule. The NMMA requests that the Commission appoint a hearing officer to conduct this rulemaking hearing, and that the Commission grant the hearing officer the authority to set a schedule for submission of written direct testimony and responses prior to the hearing. It is anticipated that the rulemaking hearing will take approximately one day or less.

NMMA reserves the right to supplement the statement of reasons for the rule change with additional reasons in support of the proposed amendments set forth in Attachment A.

Respectfully Submitted,



Mike Bowen
Executive Director
New Mexico Mining Association

ATTACHMENT A

Proposed Changes to 19.10.3.303 (A) NMAC and 19.10.3.304 (A) NMAC

TITLE 19 NATURAL RESOURCES AND WILDLIFE
CHAPTER 10 NON-COAL MINING
PART 3 MINIMAL IMPACT OPERATIONS

19.10.3.303 MINIMAL IMPACT EXISTING MINING OPERATIONS:

A. An existing mining operation that continues mining operations will not be considered a minimal impact existing mining operation if it exceeds 10 acres of disturbed land, or 40 acres of disturbed land in the case of non-energy fuel minerals operations that: (1) are located outside Bernalillo, Dona Ana and Santa Fe Counties; (2) lack significant acid drainage potential after taking into account the presence of neutralizing materials; and (3) are committed to perform concurrent reclamation of disturbed areas to the extent practicable. ~~except that an existing mining operation extracting humate may exceed 10 acres but not 20 acres if its approved closeout plan or reclamation plan provides for concurrent reclamation of mined-out areas.~~ Permanent roads and areas within the permit area that are reclaimed will not be counted as part of the acreage limitation for a minimal impact existing mining operation. Reclaimed, for this purpose, means all financial assurance has been released, except the amount held to re-establish vegetation pursuant to Subsection A of 19.10.12.1204 NMAC. Construction of roads and access ways, the types of disturbances, and the applicant's previous history of compliance with the act and 19.10 NMAC will be major factors in the director's determination of minimal impact status.

19.10.3.304 MINIMAL IMPACT NEW MINING OPERATIONS:

A. A minimal impact new mining operation will not exceed 10 acres of disturbed land, or 40 acres of disturbed land in the case of non-energy fuel minerals operations that: (1) are located outside Bernalillo, Dona Ana and Santa Fe Counties; (2) lack significant acid drainage potential after taking into account the presence of neutralizing materials; and (3) are committed to perform concurrent reclamation of disturbed areas to the extent practicable. ~~except that a new mining operation extracting humate may exceed 10 acres but not 20 acres if its approved closeout plan or reclamation plan provides for concurrent reclamation of mined-out areas.~~ Pre-existing roads and reclaimed acres within the permit area will not be counted as part of the acreage limitation for a minimal impact new mining operation. Reclaimed, for this purpose, means all financial assurance has been released, except the amount held to re-establish vegetation pursuant to Subsection A of 19.10.12.1204 NMAC. Construction of roads and access ways, the types of disturbances, and the applicant's previous history of compliance with the act and 19.10 NMAC will be major factors in the director's determination of minimal impact status.